In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1558

RICHARD BECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of an automobile, although conducted with probable cause, was unconstitutional.

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of extortion, in violation of 18 U.S.C. 1951, and of bank larceny, in violation of 18 U.S.C. 2113(b). He was sentenced to a term of twenty years' imprisonment on the extortion count and ten years' imprisonment on the larceny count. The court of appeals affirmed the bank larceny conviction but reversed the extortion conviction (Pet. App. A).[1]

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[1]In reversing the extortion conviction, the court of appeals held that 18 U.S.C. 2113 was " 'a comprehensive scheme for prosecuting and punishing persons who rob federally-insured banks' " and "was intended to exclusively proscribe conduct within its 'coverage' " (Pet. App. A4-A5).

1. On the morning of December 29, 1972, James Sledge, the manager of the Frayser (Tennessee) Branch of the National Bank of Commerce, received a telephone call from a man whose voice was similar to that of petitioner (Tr. 11-12, 18-19, 50, 137-139, 157, 162-163).[2] The caller told Sledge that Sledge's wife and grandchildren were being held hostage and demanded $50,000 (Tr. 50).[3] Sledge attempted to telephone his wife but did not get an answer because the line had been cut (Tr. 50, 335-336). Thereupon, Sledge gathered together $50,000, placed it in a white cloth sack, left the bank, and drove to a nearby telephone booth to await further instructions. Immediately upon his arrival at the phone booth, Sledge received another call and was instructed to drive to a shopping center, park his car in the lot and walk away, leaving the money on the front seat (Tr. 58, 82-85).

Meanwhile, John Dallosta, a bank customer, had noticed a worried Sledge leave the bank with a filled money bag and had followed him (Tr. 238-241, 244). Arriving at the shopping center, Dallosta parked near Sledge's vehicle and observed Sledge get out of his car without the money bag and walk out of sight (Tr. 242-243). Immediately thereafter, a man later identified as Lester Mueller approached Sledge's car and extracted the white bag (Tr. 227-229, 243-244, 252-253), and then walked to a 1973

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[2]"H." refers to the reporter's transcript of the suppression hearing, while "Tr." refers to the trial transcript.

[3]As it developed, neither Mrs. Sledge nor the grandchildren were being held as hostages (Tr. 338).

blue Thunderbird with a black vinyl top, which was being driven by another man (Tr. 190-192). Dallosta followed the Thunderbird when it was driven off and was able to observe the license plate: Missouri number GB4021 (Tr. 192-193, 246-251).

Dallosta promptly relayed this information to law enforcement officers. Approximately two hours later, Memphis police located the blue Thunderbird in a motel parking lot and placed it under surveillance (H. 15). Further investigation revealed that no motel guest had registered the vehicle; that the vehicle was licensed in the name of a Shirley Mueller of St. Louis, Missouri; that her husband, Lester Mueller, was a suspect in a similar bank extortion scheme; that a "Lester Milner" of St. Louis had registered at the motel; and that "Milner" had given false information regarding his home address and automobile ownership when he registered (H. 17-19; Tr. 384-385).

A search of the motel failed to produce the occupants of the automobile (H. 42; Tr. 385). Officers then opened the Thunderbird and seized several items for fingerprint analysis (H. 37-38; Tr. 388-389, 407-412, 428), but it then began to rain and the car was towed to a police impoundment lot (H. 38). The following morning, the trunk was opened, and several items were seized (Tr. 460-466, 475).[4]

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[4]Among the items seized were a candy box bearing petitioner's fingerprints, a notebook containing specimens of petitioner's handwriting, and a white hardhat similar to the one worn by the man who had cut the telephone lines at the Sledge residence on the morning of the extortion scheme (Tr. 342-345, 411, 463, 518-534, 822-839, 853-864).

2. Although conceding that the police officers acted with probable cause (Pet. 6), petitioner nevertheless contends that the search of another person's automobile was unconstitutional because it was conducted without a warrant.

Petitioner has no standing to contest the search of the Thunderbird. The vehicle did not belong to him but was registered to Shirley Mueller, the wife of Lester Mueller. Petitioner was not present at the time of the search, he has demonstrated no proprietary or possessory interest in the automobile, and he was not charged with an offense requiring possession. As this Court said in *Brown* v. *United States*, 411 U.S. 223, 229, there is no standing to contest a search and seizure when, as here, the petitioner

> (a) [was] not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

The recent decision of the Seventh Circuit in *United States* v. *Lisk*, No. 75-1033, decided July 2, 1975, provides a helpful analytical framework. In *Lisk*, as here, the defendant had no proprietary or possessory interest in the vehicle searched. The court therefore concluded that the violation of Fourth Amendment rights involved in the search of the car was "clearly not available to the defendant as a basis for suppressing evidence acquired thereby" (slip op., p. 3). For that reason, the court assumed that the defendant's rights were untouched by the search of the car and went on to consider the defendant's interest in the firearm seized from the car. Because it was stipulated in *Lisk* that the defendant had a proprietary interest in the firearm, the court concluded that the defendant had standing to object to its seizure. Then, putting aside the search of the car for analytical purposes (because the defendant

had no standing to contest it), the court found that "as far as defendant is concerned the case is the same as though the firearm had been found in plain view in a public place and then seized" (*id.* at 3-4); accordingly, the court concluded that the defendant had failed to demonstrate "that the evidence should be suppressed on the ground that *his* Fourth Amendment rights were violated" (*id.* at 5).

Similarly, petitioner in this case has no standing to contest the search of the Thunderbird. Since his rights were untouched by the search, he is limited to a complaint about the seizure of items from the car, and he can prevail on that issue only if he can demonstrate both some interest in those items and that his Fourth Amendment rights were violated by their seizure. He has shown neither. In *Lisk*, there was a stipulation that the defendant had a proprietary interest in the firearm seized. *United States* v. *Lisk, supra,* slip op., at p. 2. Here, there is no indication whatsoever that petitioner had such an interest in the items seized from the Thunderbird. Having failed to testify at the suppression hearing in an effort to establish one, he has no standing to contest either the search of the Thunderbird or the seizure of items therefrom.

3. In his Supplemental Memorandum, petitioner correctly points out that the decision of the Sixth Circuit on the merits in the instant case conflicts with the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Bradshaw*, 515 F.2d 360. Because the decision in *Bradshaw* is in direct conflict with decisions of the Second, Sixth, Seventh and Ninth Circuits,[5] and because in our judgment it is

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[5]See *United States* v. *Ellis*, 461 F.2d 962 (C.A. 2), certiorari denied, 409 U.S. 866; *United States* v. *Shye*, 473 F.2d 1061 (C.A. 6); *United States* v. *Castaldi*, 453 F.2d 506 (C.A. 7), certiorari denied, 405 U.S. 992; *United States* v. *Connolly*, 479 F.2d 930 (C.A. 9), certiorari dismissed, 414 U.S. 897.

clearly wrong, the United States has filed a petition for rehearing and suggestion for rehearing *en banc*, which is now pending before the District of Columbia Circuit.[6] Should that court persist in its view of the law, it may well be appropriate for this Court to resolve the conflict among the circuits. The instant case is an inappropriate vehicle for such a resolution, however, because, as we have shown, petitioner lacks standing to contest the search and seizure.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[6]Petitioner's reliance upon *United States* v. *Garay*, 477 F.2d 1306 (C.A. 5), is misplaced because that case did not involve the search of a private vehicle. Rather, after the defendant had been taken into custody, luggage belonging to him was seized from a common carrier and subjected to a warrantless search.

[7]Petitioner's argument, that this Court's decisions in *Coolidge* v. *New Hampshire*, 403 U.S. 443, and *Chambers* v. *Maroney*, 399 U.S. 427, are in conflict, is unconvincing. Rather, as this Court noted in *Cardwell* v. *Lewis*, 417 U.S. 583, 593, the *Coolidge* search was readily distinguishable from that in *Chambers* because the former entailed entry onto private property. See, also, *Cady* v. *Dombrowski*, 413 U.S. 433, ~~446~~ 447. Here, of course, the vehicle in question was parked in a public lot. Accordingly, petitioner's reliance on *United States* v. *Bradshaw*, 490 F.2d 1097 (C.A. 4), certiorari denied, 419 U.S. 895—which dealt with a warrantless search of an automobile parked on the defendant's property—is misplaced. Moreover, the Fourth Circuit has limited *Bradshaw* to the private property context in *Weaver* v. *Williams*, 509 F.2d 884, 886.